

Defendants respectfully submit this Reply in Support of the Joint Motion for Additional Time to Produce Expert Reports (Dkt #1722) (the “Motion”). Although Plaintiffs have obtained more than six additional months for their experts through multiple motions for extensions,¹ Plaintiffs assert several arguments in opposing Defendants’ first motion for such an extension. This reply addresses these arguments in turn.

I. The Principal Of “Balance” Between The Parties Should Entitle Defendants To Far More Time Than They Have Requested.

Plaintiffs’ principal argument is that there should be balance between the amount of time granted to each side’s experts to work with the data and scientific theories in this case. *See, e.g.,* Pls.’ Resp. in Opp., at 1, 4 (Dkt #1736) (“Opp.”). Defendants agree with this principle, but note that a true balance between the time granted to each side’s experts would result in far longer extensions than Defendants have requested. Plaintiffs’ experts have worked on this case for more than three years, while exercising their right to keep their theories (and even their names) confidential until recently. The current schedule provides Defendants’ experts with only three months to respond to the work generated over that timeframe.

Aside from this disparity in time allocation, Defendants’ experts have been unfairly prejudiced by the current schedule for several reasons.

A. To this day, Plaintiffs have not produced all of the relevant data required for the defense experts to do their work.

Plaintiffs have withheld – and continue to withhold – information that is essential for the defense experts to conduct their work. For months or years this data has been available to Plaintiffs’ experts. But, because Plaintiffs have delayed producing the information, the defense

¹ *See, e.g.,* Dkt #1322 (seeking an 8-month across-the-board extension); Dkt #1376 (granting Plaintiffs a 4-month across-the-board extension); Dkt #1618 (seeking an additional 4-month across-the-board extension, for which the Court granted six weeks); Dkt #1702 (seeking another week for some experts, and two weeks for others); Dkt # 1706 (granting request in Dkt #1702).

experts have only recently seen it for the first time, or will see it when Plaintiffs produce it in the coming weeks. This information that has been withheld falls into several categories.

(1) *Expert Modeling Files and Similar Expert Data.* Under this Court's orders, Plaintiffs were required to produce expert reports and the underlying "considered" materials over a three-week period beginning May 15, 2008. *See* Dkt #1706. Plaintiffs have failed to meet that burden. *See* Motion at 7-8. In the Motion, Defendants detailed several examples of the delays caused by Plaintiffs' late productions. *Id.* Further evidence of this misconduct has come forward since the Motion was filed. In particular, as discussed in greater detail in Defendants' Reply in Support of Motion to Compel Production of Plaintiffs' Working Models (Dkt #1747) ("Mot. to Compel Reply"), Plaintiffs' experts have recently admitted that Plaintiffs withheld critical components of Plaintiffs' environmental models for the past seven weeks.

After Plaintiffs' expert reports were produced, Defendants' experts worked to assemble Plaintiffs' models from the many electronic files that Plaintiffs provided. But, Defendants' experts were stymied because it appeared that Plaintiffs had withheld essential components of their models. *See generally* First, Second and Third Bierman Decl. (Dkt #1722 Exh. 1; Dkt #1721 Exh. 1; Dkt #1742 Exh. A). After Plaintiffs' refused Defendants' repeated requests to produce these materials, Defendants filed a Motion to Compel. *See* Dkt #1721.

In response to Defendants' requests, Plaintiffs affirmatively represented to the Court and Defendants on numerous occasions that all of the requested files necessary to run the models had already been produced, and even filed a Motion to Strike Defendants' Motion to Compel. *See* Mot. to Compel Reply, at 2 n. 2. We now know that these assertions were incorrect. After Defendants filed the Motion to Compel and responded to Plaintiffs' Motion to Strike, Plaintiffs allowed their modeling experts to talk with Defendants' experts. *See* Mot. to Compel Reply at 3.

In those teleconferences, Plaintiffs' experts admitted that a number of essential files from their models were not produced. *See* Fourth Bierman Decl. at ¶¶ 8-9, 11-13 (attached Exh. A). Moreover, the answers that Plaintiffs previously provided to some of Defendants' questions incorrectly directed Defendants to utilize the wrong files and calibrations. *Id.* at ¶¶ 8, 14. Plaintiffs have now agreed to produce the omitted and correct materials identified during these conference calls, and have started that process. *Id.* at ¶¶ 8, 10, 15; Mot. to Compel Reply at 4.

Without these files it was impossible for Defendants' experts to assemble Plaintiffs' models and begin the process of testing them. Fourth Bierman Decl. at ¶ 16. Accordingly, the defense experts' efforts the past seven weeks have been largely wasted, as they are just now able to begin assembling the models. *Id.* at ¶ 16. Once assembled, Dr. Bierman has testified that he will need several months to test them. First Bierman Decl. at ¶ 15 (Dkt #1722 Exh. 7).

Plaintiffs' delay in producing these critical materials has also prejudiced several other defense experts. When Plaintiffs sought a recent extension, Plaintiffs' limnologists testified they could not complete their work until Plaintiffs' models were finished. *See* Affidavit of Eugene B. Welch, at ¶ 3 (Dkt #1702 Exh. 2) ("[o]ur work . . . is dependent upon the results of certain environmental modeling which is being conducted by Dr. Scott Wells"). Similarly, Defendants' experts Timothy Sullivan, Alex Horne and James Chadwick have testified that they must await Dr. Bierman's analysis of Plaintiffs' models before they can finish their work. *See* Chadwick Decl. at ¶ 13 (Dkt #1722 Exh. 10); Sullivan Decl. at ¶¶ 7-8 (Dkt #1722 Exh. 11); Horne Decl. at ¶¶ 7-10 (Dkt #1722 Exh. 12). Thus, the work of all of these experts has been delayed almost two months by Plaintiffs' failure to meet their discovery obligations until compelled to do so.

(2) Pre-existing State Databases, Sampling Data, and Other Documents the Court has Previously Ordered Produced. Much of Plaintiffs' sampling data has been produced to

Defendants only in the last few months. Defendants' experts are working through that information. Yet, even now, Plaintiffs have failed to produce all of the data relevant to their expert case. Rather, they continue to produce (and in some cases, to withhold) data and information, while also producing new data for the experts to consider on a weekly basis.

For example, Defendants noted in the Motion that Plaintiffs had withheld several of the State's databases of environmental data, containing information about (a) septic systems in the Illinois River Watershed, (b) overflows and bypasses of the sewage treatment systems that drain into the Illinois River, (c) use of biosolids (sewage sludge) in the IRW; and (d) environmental complaints. *See* Motion at 6-7. Obviously these databases are relevant to the work of a number of Defendants' experts. Since the filing of the Motion, Plaintiffs have produced three of these databases -- which Defendants' experts are just now beginning to analyze -- but still have not produced the database on sewage system bypasses. *See* attached Exh. B.²

Similarly, Plaintiffs continue to produce sampling data to Defendants. Exhibit D catalogs several examples in this ongoing stream of productions evidencing that, even several years into this case, Plaintiffs' production of materials is still not complete. In fact, Plaintiffs recently sent substantial productions to Defendants on May 30, June 6, 10, 13, 18, 19, 25, 27, July 2 and 10, and have indicated that they intend to continue to generate expert data. *See* attached Exh. D.

This ongoing flow of sampling data presents the defense experts with a moving target. As Dr. Timothy Sullivan explained in his declaration, the addition of new data does not simply

² Plaintiffs' Opposition claims that they previously produced some of the information in these databases in hard-copy form, *see* Opp. at n. 7, but Defendants have been unable to verify this representation as to several of the databases. Defendants have been able to confirm that, with regard to the septic system database, Plaintiffs have not produced anything that resembles the information described by Plaintiffs' 30(b)(6) witness. Regardless, Plaintiffs should have produced the databases in the electronic form used by the State to make them reasonably usable to Defendants. Finally, these are just a few examples of the data Defendants await from Plaintiffs. For another egregious example of information still being withheld, see Exhibit C.

add an incremental burden to analyze the newly-disclosed facts. *See* Sullivan Decl. at ¶ 6.

Rather, in a complex environmental case such as this, all of the data are inter-related. *Id.*

Accordingly, the revelation of substantial new data can cause an expert to reevaluate older data and change portions of his analysis and conclusions. *Id.* At a minimum, the defense experts must constantly revisit the work they have previously completed. If Plaintiffs are allowed to continue sending new data to Defendants' experts, the defense experts' work will never be done.

For that reason, Defendants respectfully request that the Court fix a date by which Plaintiffs must conclude their production of data and information that is to be considered by the experts in this case. Clearly that was the Court's intention when it established a deadline for production of Plaintiffs' expert reports. At some point a party's allegations must be fixed so as to allow those allegations to be tested in a meaningful and orderly manner. As the Sixth Circuit stated, parties "are not free to present a moving target, thereby making the courts (both us and the district court) as well as their opponent guess at the nature of the claim presented to the court." *Val-Land Farms v. Third National Bank*, 937 F.2d 1110, 1113 (6th Cir. 1991). Only after Plaintiffs finally produce the information that is the basis of their expert case, can Defendants' expert work proceed expeditiously. Further submissions should be subject to the federal courts' stringent standard for admitting late-produced expert evidence.³

³ Under that test, a party seeking to make a last-minute change in expert evidence must show that: (i) substantial justification exists for the Court to allow the changes; or (ii) the changes are harmless to their opponents. *See* Fed. R. Civ. P. 37(c)(1); *Okupaku v. American Airlines, Inc.*, 2007 WL 3511917 at *1-2 (S.D. Fla., Nov. 14, 2007); *Trustees of Painters Union Deposit Fund v. Interior/Exterior Specialist, Co.*, 2007 WL 4119020 at *1-3 (E.D. Mich., Nov. 16, 2007); *Avance v. Kerr-McGee Chem. LLC*, 2006 WL 3484246 at *1-7 (E.D. Tex., Nov. 30, 2006) (striking last-minute affidavits revising the sources, calculations and information underlying the experts' opinions). This standard applies regardless of whether the deadline was set by the Court, by Rule 26, or whether the prejudice flows from a discovery failure. *See* *Trustees of Painters Union*, 2007 WL 4119020 at *1-3; *Avance*, 2006 WL 3484246 at *6-7; *Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.*, 297 F. Supp. 2d 463, 480-81 (N.D.N.Y. 2003).

Defendants respectfully suggest that the deadline for producing information to support Plaintiffs' expert case passed with the deadline for producing their expert reports. Nevertheless, Defendants recognize that Plaintiffs are appealing this Court's Order requiring them to produce documents they have withheld for many months under claims of privilege. *See* Dkt #1716; Dkt #1735. Accordingly, Defendants urge the Court to affirm the already-passed deadline as the cutoff for production of materials supporting Plaintiffs' expert case, with an exception for the information to be produced when this Court's May 20, 2008 Order is affirmed.

(3) Depositions. Lastly, the deposition calendar demonstrates the infeasibility of the current deadline. To gather information that the defense experts required, Defendants provided the State with Rule 30(b)(6) deposition topics in November 2007. *See* attached Exh. E. To date, the State has only been able to schedule a few 30(b)(6) witnesses, and Defendants have found some of those witnesses to be so poorly prepared that the parties have agreed to take the depositions a second time. *See* attached Exhs. F and G. Defendants have repeatedly asked Plaintiffs for dates when they can schedule these remaining depositions, but Plaintiffs have been unable to schedule *a single additional* 30(b)(6) deposition. *Id.* Meanwhile, Defendants' experts await the information from these depositions, which they have sought for over eight months.

Similarly, the expert deposition schedule that the parties have adopted by agreement shows that an extension for the defense expert reports is necessary. As detailed in the Motion, Plaintiffs have identified 18 retained experts. *See* Motion at 8-10. Initially, Plaintiffs proposed that the parties take depositions of these experts up until the day the defense reports are due. *Id.*; *see* Motion Exh. 18. However, at the Court's urging, Plaintiffs and Defendants have now worked out an acceptable schedule for the depositions of Plaintiffs' experts, as follows:

Robert Taylor:	July 15	Todd King:	July 22
Valerie Harwood	July 18:	Lowell Caneday:	July 23

Robert Lawrence:	July 23	Berton Fisher:	September 3-4
Chris Berger:	July 23	Meagan Smith:	September 10
Christopher Teaf:	July 30-31	Roger Olsen:	September 10-11
Eugene Welch:	August 14-15	Bernard Engel:	September 17-18
Gordon Johnson:	August 19	Dennis Cooke:	September 24-25
Darren Brown:	August 26	Jan Stevenson:	September 30
Scott Wells:	August 28-29		

See attached Exhs. H and H(1). These mutually-agreed dates are fully consistent with the brief extensions Defendants have requested, but extend beyond the current deadline of August 14.⁴

Plaintiffs argue that Defendants do not need to take these depositions before completing their expert reports. *See* Opp. at 14. This argument misses the point. The Court will be better served if the defense experts fully understand the work Plaintiffs' experts have undertaken, as the Court needs to know how those conclusions were reached and what errors, if any, were made. Given that trial is not scheduled until September 2009, it would be nonsensical for the defense experts to submit reports first, before exploring the details of Plaintiffs' expert work via depositions.

B. Throughout this case, Defendants have emphasized that their experts could not guess all of Plaintiffs' expert theories and data in advance of the expert reports.

Plaintiffs' second over-arching argument is that the defense experts should have anticipated the theories of Plaintiffs' experts and developed responses before Plaintiffs' expert reports were produced. *See* Opp. at 8-10. Plaintiffs claim that their complaint was "fact-rich" and that other communications should have alerted Defendants to the details of Plaintiffs' expert theories. *Id.* at 8. Plaintiffs also assert that they have produced a large volume of data and that Defendants should have surmised their scientific claims from that information. *Id.* at 9.

These arguments ignore the history of this case. Plaintiffs' complaint actually contains only sweeping generalizations than neither anticipate the specific arguments now advanced by Plaintiffs' experts, nor clarify where in the 1 million acre watershed these claims will be focused.

⁴ Similarly, one of the laboratories utilized by Plaintiffs has advised that, due to an office move, it cannot respond to Defendants' expert discovery until mid- to late-August. *See* attached Exh. I.

See, e.g., Second Amended Complaint at ¶¶ 21-44 (asserting Defendants “have known and have had reason to know” that poultry litter has caused an indivisible harm to the entire “1,069,530-acre” watershed “including the biota, lands, waters and sediments therein”). What has been clear from the first is that Plaintiffs’ claims would be driven primarily by experts, and that Defendants could not anticipate all of the specifics of Plaintiffs’ expert theories in light of the rules of expert confidentiality. In fact, Defendants have repeatedly sought to discover the details of Plaintiffs’ expert case so they could do precisely the work Plaintiffs now claim should have been done. But Plaintiffs repeatedly rejected Defendants’ attempt to discover their scientific theories, emphasizing that they had a right to keep their expert case confidential until the deadline for expert reports.⁵ Moreover, the mass of data that Plaintiffs have produced in this case makes Defendants’ expert work slower, not faster, particularly when (as this Court has recognized) Plaintiffs have withheld a large amount of the data for many months.

In sum, Defendants’ experts have worked diligently while this case has been pending, but Plaintiffs have exercised their right to keep the details of their complex scientific theories confidential until recently. As Defendants have repeatedly cautioned Plaintiffs, this procedure only slows Defendants’ ability to respond to Plaintiffs’ expert reports. *See* Dkt #1652, at 1.

II. Plaintiffs’ arguments about specific defense experts are incorrect and contradict what Plaintiffs told this Court when they needed a similar extension.

Plaintiffs also make a number of arguments against the specific extensions requested by

⁵ For example, in May 2006, Defendants issued discovery asking Plaintiffs to identify any experts who would testify at *any hearing* to be held in this case and the basis of their opinions. *See* Dkt #1380 Exhs. C and D. Plaintiffs refused to disclose the identity of any experts, their opinions, or the basis for these opinions until more than a year later, when it was convenient for Plaintiffs to disclose some experts in their motion for a preliminary injunction (“PI”). Even during the PI, Plaintiffs disclosed only those experts and theories relating to the PI, and specifically forbade Defendants from inquiring into scientific matters that extended beyond those issues. For instance, on November 16, 2007, Defendants asked Plaintiffs to provide Rule 26(a)(2) expert disclosures for their PI experts. *See* Dkt #1380 Exh. A. On November 29, Plaintiffs’ advised that they would provide no such information.

several defense experts. Plaintiffs first argue that Dr. McGuire does not need to gather data or depose the operators of water treatment utilities because that data could have been previously gathered and those depositions have not been scheduled. *See Opp.* at 16-17. However, as noted above, the specifics of Plaintiffs' theories were not previously known, and thus, it would have wasted the parties' time and resources to randomly gather data or subpoena third parties. Moreover, the depositions Dr. McGuire requests have not been scheduled because Defendants have attempted to work out a cooperative schedule with Plaintiffs, rather than simply sending subpoenas. *See attached Exh. G.*

Similarly, Plaintiffs argue that Dr. Bierman should have built his own models. *See Opp.* at 20. But, Dr. Bierman has testified that the IRW is likely too complex to model with sufficient accuracy. *See First Bierman Decl.* ¶ 6 (Dkt #1722 Exh. 7). Regardless, he would need to evaluate the models Plaintiffs produced. *Id.* Plaintiffs then argue that Dr. Bierman does not need 60 days to test the scenarios in Plaintiffs' models because those models can be run quickly if multiple computers are utilized simultaneously. *See Opp.* at 20-21. As an initial matter, this argument ignores that Plaintiffs' faulty production has precluded Dr. Bierman from even beginning his analysis. *See supra* Part I.A.(1). Further, this assertion is directly contrary to the declarations that Plaintiffs submitted to this Court when seeking an extension for their expert reports, in which Dr. Wells stated that he needed additional time because "[t]he computer simulation model of Tenkiller Reservoir takes from 4-7 days to run a 50-year simulation After running the model, it takes from 2-5 days to analyze the results of a [sic] each simulation." Dkt #1702 Exh. 1. Now, Plaintiffs state that Dr. Bierman does not need extra time to run these same models because "he bases [his] assumption on Dr. Wells' time estimate for running the model (4-7 days) and analyzing the results (2-5 days) multiplied by the number of scenarios," but

“this estimate is only valid if he has just one computer” and “Dr. Wells and his team used up to seven computers to run the scenarios.” Opp. at 20 & n.15. Defendants respectfully assert that a party cannot be permitted to rely on sworn facts when seeking an extension of time, then deny the truth of those facts when opposing the other party’s motion.

Finally, Plaintiffs argue that James Chadwick, Defendants’ aquatic ecology expert, does not need time to take samples because he could have taken those samples in the past. *See* Opp. at 23. This argument is incorrect. Defendants could not have undertaken a program of sampling for aquatic ecology without first knowing where and how Plaintiffs sampled. It would be unreasonable to randomly sample hoping to hit the same spots that Plaintiffs were sampling.⁶ Also, if Plaintiffs’ sampling of those locations were adequate, the parties’ time and resources need not be wasted on further sampling. But, Defendants could not have known the full extent of Plaintiffs’ sampling until recently because, as the Court has recognized, Plaintiffs withheld much of their ecological sampling for up to 8 months.. *See* May 20, 2008 Op. and Order (Dkt #1710).⁷ Moreover, Defendants are still piecing together exactly what Plaintiffs have done, because, even now, much of the ecological sampling material Plaintiffs have produced is in an unreadable format, despite repeated requests for Plaintiffs to remedy this problem. *See* attached Exh. J. However, it is now clear that at least some aspects of the ecological sampling were not sufficient to support the claims Plaintiffs have made, and further sampling would be helpful.

For the foregoing reasons, Defendants’ motion for an extension of time to file expert reports should be granted.

⁶ Plaintiffs’ experts note that the IRW “includes the Illinois River, Caney Creek, Dry Creek, Elk Creek, Sixshooter Creek, Terrapin Creek, Chicken Creek, Snake Creek, Cato Creek, Pine Creek, Salt Creek, Dogwood Creek, Burnt Cabin Creek, Sisemore Creek and Pettit Creek” with a total area of “1,610 square miles.” Caneday Report, at 12.

⁷ In fact, much of the material that was the subject of this Court’s recent sanctions order consists of information about Plaintiffs’ aquatic ecology sampling program. *Id.*

Respectfully submitted,

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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